Supreme Court, U.S.
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No. 98-1854

IN THE

Supreme Court of the United States

CHIBU C. ANAEME,

Petitioner,

v.

DIAGNOSTEK, INC.; HEALTH CARE SERVICES; *and* HPI,

Respondents.

On Petition For Writ of Certiorari To
The United States Court of Appeals for the Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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9RR

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. Petitioner Has Presented Compelling Reasons For The Court To Grant This Petition By Raising An Important Question Of Federal Law, As Well As A Substantial Policy Dilemma, Arising From The District Court's Misapplication Of The Burden-Shifting Requirements In Race-Based Employment Discrimination Cases 2

II. Petitioner Has Not Merely Requested That This Court Reweigh Evidence That A Jury Has Already Considered; Rather, Respondents Never Met Their Burden of Production, Thereby Entitling Petitioner to Judgment As A Matter Of Law 5

III. Petitioner Has Shown That the District Court Abused Its Discretion by Failing to Bifurcate The Trial, Thereby Permitting the Jury to Consider Improper and Highly Prejudicial Evidence Such That The Refusal To Grant Petitioner A New Trial Constitutes Reversible Error 6

CONCLUSION 7

TABLE OF AUTHORITIES

Cases **Page**

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 1,4,5

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) 2,6

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 1,6

Other Materials

SUP. CT. R. 14(4) 3

ARGUMENT

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court established the burden-shifting framework that governs race-based employment discrimination cases. To establish a *prima facie* case, a plaintiff whose racial identity indicates minority status must show that he was qualified for and applied for an employment opportunity offered by the defendant. The plaintiff must also show that the defendant nonetheless rejected him from the applicant pool while continuing to seek similarly-qualified applicants. *Id.* at 802.

In this case, Petitioner Anaeme, a black Nigerian American and a licensed pharmacist, showed that he had repeatedly applied for employment opportunities advertised by the respondents during a period lasting longer than three years (Pet. at 3). He also showed that, although respondents never interviewed Anaeme and never extended an employment offer, they continued to seek and to hire similarly-qualified applicants. *Id.* at 3-4. Accordingly, the District Court properly determined that Anaeme had clearly established a *prima facie* case creating a presumption of racial employment discrimination (App. at 22a). The Tenth Circuit did not question that judgment (App. at 6a). Once Anaeme had established his *prima facie* case, respondents bore the burden of producing a "legitimate, nondiscriminatory reason" for rejecting his applications. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981), but failed to do so.

In their Brief in Opposition, respondents claim the following: (1) that this case is "unexceptional" and "presents no important question of federal law" (Opp. at 1); (2) that review of this case would merely involve reweighing the

evidence already considered by a jury (Opp. at 9); and (3) that Anaeme has waived any objection regarding bifurcation of the trial (Opp. at 11). Respondents are mistaken on each count.

I.

Petitioner Has Presented Compelling Reasons For The Court To Grant This Petition, By Raising An Important Question of Federal Law, As Well As A Substantial Policy Dilemma, Arising From The District Court's Misapplication Of The Burden-Shifting Requirements In Race-Based Employment Discrimination Cases

This case turns on whether the introduction of a mere theory, however disproved, suffices to meet respondents' burden of producing a legitimate, nondiscriminatory reason for failing to hire Anaeme. The respondents and the Tenth Circuit rely heavily on *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), wherein this Court noted that the proffered legitimate nondiscriminatory explanation need not be subjected to a credibility assessment. *Id.* at 509. Yet, neither in *Hicks* nor elsewhere has this Court gone so far as to reduce a defendant's burden of production to the presentation of a hypothesis or mere speculation.

After Anaeme met his initial burden of establishing the *prima facie* case for race-based employment discrimination, respondents countered by claiming they possessed no record or recollection to support Anaeme's assertion that he had repeatedly applied for employment (App. at 7a).[1] When

[1] Respondents assert that Anaeme "ignore[d] or dismiss[ed] so much vitally important evidence" as to constitute a violation of Supreme Court Rule 14(4) (Opp. at 7-8). This assertion itself is so

Anaeme provided the respondents' written acknowledgments of receiving his applications (Pet. at 7), the District Court properly determined that they had not met their burden of producing a legitimate, nondiscriminatory reason for the failure to hire Anaeme (App. at 23a). Nonetheless, the District Court permitted a jury to consider the merits of the case, to Anaeme's detriment.

Furthermore, the Tenth Circuit failed to overrule the District Court. This refusal to hold respondents accountable to their burden of production in a race-based employment discrimination case necessarily implicates federal law.

The Tenth Circuit has apparently determined that a defendant may rebut a presumption of racial discrimination merely by asserting that no recollection or recording in *its* possession supports the *plaintiff's* case. Such an outcome

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devoid of merit that petitioner hesitates to respond at all.

For the record, however, we note that Anaeme's petition includes references to both types of the allegedly ignored "evidence" cited by respondents. The facial deficiencies in Anaeme's applications were referenced with respect to "after-acquired" evidence (Pet. at 11) and general *de minimus* assertions (Pet. at 10, 12). The petition emphasized that after-acquired evidence was inadmissible and that respondents' general denials of discrimination did not meet their burden of producing a legitimate nondiscriminatory *reason* for failing to hire Anaeme.

Respondents' citations to Anaeme's petition are deliberately taken out of context, but it should suffice to note that petitioner referenced in depth only the *admissible or relevant* evidence presented by respondents. If such references appeared to focus only on one argument (Opp. at 8), this should indicate the vulnerability of respondents' position rather than an effort by Anaeme to withhold relevant information.

would render meaningless the burden-shifting framework in *McDonnell Douglas*. If this decision is permitted to survive review, the law in the Tenth Circuit with respect to race-based employment discrimination cases will significantly depart from the law in effect elsewhere. Accordingly, the Tenth Circuit's decision strongly suggests that this Court should clarify both the legal import of the burden of production and the standard whereby a party effectively meets such a burden under the framework established in *McDonnell Douglas*.

Significantly, in its *de novo* review, the Tenth Circuit determined that respondents had met their burden (App. at 7a). When two courts examine the same evidence and apply the same burden-shifting framework to the facts, yet form opposite conclusions to reach an identical result, something is amiss.

In fact, the Tenth Circuit actually admitted that respondents' "proffered reason does not explain what motivated them or what their intent was as to [Anaeme's] applications" (App. at 12a). How, then, could the Tenth Circuit reasonably conclude that respondents had met their burden of producing a legitimate, nondiscriminatory reason for rejecting Anaeme's application? In these circumstances, it is appropriate for this Court to clarify the law on this score.

The respondents would have the Court believe that such an outcome would prove "unexceptional" (Opp. at 1), but this case poses a substantial policy dilemma. By introducing perverse incentives, it could easily foster greater efforts to frustrate the administration of justice. If the District Court's decision stands, employers within the Tenth Circuit who fear racial discrimination lawsuits will have every reason to ensure

that records are not maintained and that recollections do not exist with respect to their hiring practices. The *McDonnell Douglas* framework of burden-shifting was established precisely because the employer held significant advantages with respect to the production of relevant evidence, but the Tenth Circuit's decision in this case would render that logic meaningless.

II.

Petitioner Has Not Merely Requested That This Court Reweigh Evidence That A Jury Has Already Considered; Rather, Respondent Never Met Its Burden of Production, Thereby Entitling Petitioner to Judgment As A Matter Of Law

Respondents inaccurately claim that Anaeme seeks review of the jury's decision (Opp. at 9), but the jury should never have considered the merits of this case. Quite simply, respondents never met their burden of production, and Anaeme is entitled to judgment as a matter of law.

To overcome their dilemma, respondents have attempted to cast doubt on the strength of Anaeme's applications. They have speculated that *had they been aware* of Anaeme -- a fact which they explicitly denied -- they *would have* rejected him as a candidate for employment due to certain deficiencies in his application.

Respondents apparently forget that they are limited to relying only on "admissible evidence" to articulate a *reason for rejecting the applicant* in question. *Burdine*, 450 U.S. 248 at 254-55 (emphasis added). This Court has noted that such evidence, "*taken as true*, would *permit* the conclusion that

there was a nondiscriminatory reason for the adverse action." *Hicks*, 509 U.S. 502 at 509 (emphasis in original). The absence of evidence to confirm petitioner's claim that his application was on file, *if true*, does not contradict the concrete, written acknowledgments produced by petitioner, nor does it *permit* a nondiscriminatory reason for rejecting petitioner's application so much as argue that the application never existed. While respondents do not necessarily bear the burden of producing a credible alternative theory of the case, they must show more than a hypothetical.

III.

Petitioner Has Shown That the District Court Abused Its Discretion by Failing to Bifurcate The Trial, Thereby Permitting the Jury to Consider Improper and Highly Prejudicial Evidence Such That The Refusal To Grant Petitioner A New Trial Constitutes Reversible Error

Even if any of the theories offered by the respondents had constituted a legitimate, nondiscriminatory reason for the failure to hire Anaeme, all other evidence cited by the respondents is either inadmissible or irrelevant. By their own admission, the respondents had no record of receiving Anaeme's applications and therefore could not have been aware of any alleged facial deficiencies until after the fact. This evidence was undoubtedly highly prejudicial to Anaeme.

Significantly, respondents never claimed to have considered this evidence; rather they speculated that they *might have done so* had they received Anaeme's applications. This "after-acquired" evidence was rightfully inadmissible regarding liability because by its nature it could not have been

considered at the time Mr. Anaeme was rejected as a job applicant.

No other evidence offered by respondents could provide an alternative explanation to racial discrimination. No other rationale can explain the jury's holding for the respondents. Accordingly, since the jury could not have reached its verdict without considering inadmissible, "after-acquired" evidence, the District Court's failure to bifurcate the proceedings constituted an abuse of discretion and reversible error.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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